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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FREDERICK BATES et al., Plaintiffs and Respondents, v. LAWRENCE H. DAVIS, Defendant and Appellant.	B204955 (Los Angeles County Super. Ct. No. BS 111034)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Jacks & Maybaum and Bradley W. Jacks for Defendant and Appellant.

Brown & Associates and Matthew C. Brown for Plaintiffs and Respondents.

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Lawrence H. Davis (Davis) appeals from a trial court order granting Frederick Bates, Andrea Brown, Todd Bates, Ryan Bates and Brett Bates (the Bates) leave to file a complaint alleging a conspiracy between an attorney and his deceased former client, as provided in Civil Code section 1714.10 (section 1714.10). Davis's *only* contention on appeal is that the trial court erred in granting the Bates leave to file their complaint because under section 1714.10 the Bates failed to establish a reasonable probability of prevailing on their claim. We hold the trial court did not err in allowing the Bates to file their complaint and therefore affirm.

FACTS AND PROCEDURAL HISTORY[1]

By way of background, in February 2006 Davis was involved in probate litigation with the Bates concerning the Jack Calig estate. Many of the claims that were alleged in the probate action are similar to those at issue in the present action.

In April 2006, Davis's counsel filed a demurrer in the probate court to the petition filed by the Bates. In his demurrer, Davis raised strong opposition to the Bates' petition, pointing out, among other things, that they had failed to obtain a section 1714.10 prefiling order before filing their petition. Following argument, the probate court sustained the demurrer with leave to amend. The Bates then voluntarily dismissed their claims in the probate court without prejudice. Subsequently, the probate court approved a settlement agreement among some of the parties involved in the probate matter. Davis was not a party to the settlement agreement.

Jumping ahead to September 2007, the Bates later filed a petition in the trial court for an order pursuant to section 1714.10. They sought permission to file a civil complaint against Davis for "Damages Caused by Attorney's Active Participation in Breach of

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1 As Davis notes, the Bates' brief violates the California Rules of Court in failing to provide a single cite to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) We may disregard statements of fact not supported by appropriate reference to the record. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947; *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.) The Bates' violation of this rule has placed an undue burden on this court. Although not obliged to do so, we have conducted an independent review of the record despite the Bates' dereliction.

Trust." The verified petition set forth the following facts, which were mirrored in the complaint.

The Bates are the grandchildren of Jack Calig and his predeceased spouse, Phyllis Calig. Jack Calig died on February 17, 2005. Phyllis Calig died about one and a half years earlier, on June 16, 2003. Jack and Phyllis Calig were cosettlors and cotrustees of a family trust, which was last amended and restated on April 10, 2003 (2003 trust). Upon Phyllis Calig's death, Jack Calig became the sole trustee of the 2003 trust.

Under the terms of the 2003 trust, the Bates were to be the primary (65%) beneficiaries upon the death of both Phyllis and Jack Calig. The 2003 trust provided that, upon Phyllis Calig's death, one-half of the assets of the 2003 trust would be placed in an irrevocable portion of the 2003 trust. That irrevocable portion vested residuary benefits in the Bates and other grandchildren of Phyllis and Jack Calig, and Jack Calig had only a lifetime interest in those assets.

It is estimated that the assets in the irrevocable portion of the 2003 trust had a value of approximately $5 million, of which the Bates' 65 percent interest amounted to approximately $3.3 million.

Before Jack Calig's death, Davis provided legal advice to Calig individually and as trustee of the 2003 trust. He also provided legal advice to Calig as trustee of another trust called the "Jack Calig 2004 Revocable Living Trust" (2004 trust). In contrast to the 2003 trust in which the Bates were named beneficiaries, the Bates were to receive no benefits under the 2004 trust.[2]

On March 1, 2004, almost a year before Jack Calig's death, Davis wrote him a letter (March 2004 letter), a copy of which was included as an exhibit to the petition and proposed complaint. In his letter, Davis told Calig that the 2003 trust was "defective." Davis mentioned three trusts created by the 2003 trust: a survivor's trust, a marital trust

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[2] Jack and Phyllis Calig's three children received nothing under the 2003 trust, and their grandchildren, including the Bates, were the named residuary beneficiaries. Under the 2004 trust, however, Jack and Phyllis Calig's children were the named beneficiaries, and the grandchildren were beneficiaries only by right of representation.

and a disclaimer trust. He advised Jack Calig that "[i]t is in the language of the Disclaimer Trust that this document is defective." Specifically, Davis's letter stated that the provisions of article seven, paragraph 3(a) and (b), of the 2003 trust contained "incorrect" language that "would not be effective in shielding the estate from Estate Tax at your [i.e., Jack Calig's] subsequent death."

Davis's March 2004 letter informed Jack Calig that "[s]ince there is no way to correct this language *since the trust is irrevocable* and . . . your dispositive plan has changed from the time of the old [i.e., 2003] trust, *the only way around it is to ignore the entire document*." (Italics added.) Davis's letter further continued, "This means that *we need to remove the property from this trust* as soon as possible *and transfer it into the new trust*." (Italics added.) Davis stated, "I have tried to take a 'band-aid' approach to correcting the trust (*just in case we can't get all the assets out in time*) by drafting an Amendment (which you signed on February 25, 2004). This effectively transfers any assets held in the Survivor's Trust of the Calig Family Trust into the Jack Calig 2004 Revocable Living Trust." (Italics added.)

The Bates did not discover the terms of the 2003 trust and were not aware of the March 2004 letter until after Jack Calig's death.

The Bates allege that the plan Davis created for Jack Calig in effect called for the conversion of assets from the 2003 trust. They assert that the letter is evidence of Davis's participation in the improper transfer of assets from the 2003 trust to the 2004 trust and his specific knowledge that the transferred assets belonged to the 2003 trust. The Bates contend in their petition and proposed complaint that the advice and directions Davis gave Jack Calig regarding the 2003 trust, and the documents Davis prepared to carry out the plan laid out in the March 2004 letter, resulted in numerous legal problems and litigation. These included two superior court lawsuits that were resolved in part by the probate court settlement.

In their petition and proposed complaint, the Bates claim they suffered damages of more than $1 million as a result of the plan Davis designed in his March 2004 letter and the documents he created pursuant to his plan.

In opposition to the Bates' petition for leave to file their complaint, Davis provided a declaration admitting that he performed legal services for Jack Calig in connection with certain trust and estate matters. Davis confirmed that he began performing such services for Calig in approximately September 2003, and the services included legal advice, planning and preparation of documents pertaining to the 2003 trust and the 2004 trust. Davis denied having any attorney-client relationship with the Bates or offering them any legal advice. He stated he never communicated with the Bates concerning the 2003 trust, the 2004 trust or any other aspect of Jack Calig's estate planning. He never received assets from the 2003 trust or the 2004 trust. He stated he was paid by Jack Calig personally and received no other remuneration for his legal work for Calig. He had no control of or access to any assets of the 2003 trust or the 2004 trust.

The court granted the Bates' petition pursuant to section 1714.10, allowing the Bates to file the instant complaint, and this appeal followed.

DISCUSSION

As noted previously, the only issue Davis argues on appeal is whether the trial court's order should be reversed because the Bates failed to establish a reasonable probability of prevailing on their "attorney-client conspiracy action" as required by section 1714.10. Although the complaint in this case is entitled "Complaint for Damages Caused by Attorney's Active Participation in Breach of Trust" and does not purport to be a complaint against an attorney for a civil conspiracy with his client, the allegations may be susceptible to such an interpretation. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1109-1110.) We thus presume that section 1714.10 applies to the proposed complaint and discuss whether the Bates have established a reasonable probability of prevailing on their claim as required under that section. We hold that because the Bates have met this burden, the trial court did not err in allowing the Bates to file their complaint.

1. Compliance with Section 1714.10

Section 1714.10 is a gate-keeping statute that "generally requires a prima facie showing prior to the assertion of a claim for conspiracy against an attorney and client." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802

809-810 (*Berg & Berg*).) "[T]he legislative purpose of section 1714.10 [is] to eliminate frivolous allegations that attorneys have conspired with their clients. This statutory purpose is served by a construction that requires a prefiling procedure to determine whether the proposed conspiracy pleading is legally sufficient, and whether it is supported by a sufficient prima facie showing of facts to sustain a favorable decision if the evidence submitted by the petitioner is credited. If either of these requirements is not met, the petition must be denied; if both are satisfied, it must be granted." (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 931-932.)

Section 1714.10, subdivision (a) requires a plaintiff seeking to assert a conspiracy claim to file a "verified petition . . . accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based." The special procedure operates like a demurrer or motion for summary judgment in reverse. The petitioner bears the burden of showing a legally sufficient claim "'substantiated'" by "competent, admissible evidence" in a manner similar to that of a plaintiff responding to a motion for summary judgment. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.)

The trial court does not weigh the evidence but "merely assesses whether the plaintiff has stated and substantiated his or her claim. [Citation.]" (*Berg & Berg*, *supra*, 131 Cal.App.4th at p. 817, fn. 7.) This determination whether the petitioner has met his or her burden under section 1714.10 presents a question of law, which we review de novo. (*Berg & Berg*, *supra*, at p. 822.)

In the present case, although asserting it did not apply to the proposed complaint, the Bates nevertheless complied with the procedure set forth in section 1714.10. The Bates filed a verified petition naming the attorney (i.e., Davis) as respondent, "accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based." (§ 1714.10, subd. (a).) The petition was also accompanied by "evidence showing that a prima facie case will be established at trial . . . ." (*Hung v. Wang*, *supra*, 8 Cal.App.4th at pp. 933-934; see *Burtscher v. Burtscher* (1994) 26 Cal.App.4th 720, 726.)

2. Reasonable Probability of Prevailing on Claim

A. The Bates' Prima Facie Case

The verified petition asserted, and Davis did not dispute, that Davis drafted and delivered the March 2004 letter to his client. The March 2004 letter on its face indicates Davis advised his client that the 2003 trust, or at least a portion of the trust, was irrevocable and that existing assets were part of this irrevocable trust. Davis purported to advise his client in the letter that "we need to remove the property from this trust" and transfer the property into a "new trust." Davis also purported to advise his client in the March 2004 letter, "just in case we can't get all the assets out in time," Davis had already taken a "'band-aid' approach" by having Jack Calig sign an amendment, to "effectively transfer[] any assets held in the Survivor's Trust of the Calig Family Trust into the Jack Calig 2004 Revocable Living Trust." The exhibits attached to the Bates' petition demonstrate that Jack Calig was trustee of both the 2003 trust and the 2004 trust. A transfer of assets from the irrevocable trust created by Phyllis Calig and Jack Calig into another trust created for Jack Calig's sole benefit would appear to constitute a breach of Calig's fiduciary duty as trustee of the 2003 trust.

B. Actionable Common Law Claim

Davis asserts the Bates have no actionable claim against him because they cannot overcome the section 1714.10's requirement that they demonstrate an *actionable* attorney-client conspiracy. Davis argues that the Bates cannot show that Davis either (1) made a direct representation to them or (2) personally gained from Jack Calig's decision to change the 2003 trust. (*Berg & Berg*, *supra*, 131 Cal.App.4th at p. 824.)

In *Berg & Berg*, *supra*, 131 Cal.App.4th at page 824, the Sixth District stated, "to come within [section 1714.10's] exceptions and thereby state a viable conspiracy claim against an attorney, the complaint must plead either that '(1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.' (§ 1714.10, subd. (c).)" Quoting *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 (*Doctors' Co.*), the court

in *Berg & Berg* stated, "The rule generally provides that '[a] cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.'" (*Berg & Berg*, *supra*, at p. 824.)

Our Supreme Court in *Doctors' Co.* has likened attorneys representing clients to agents and employees of a corporation, declaring that "'[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. [Citations.]'" (*Doctors' Co.*, *supra*, 49 Cal.3d at p. 45.) However, "[i]t remains true . . . that under *other* sets of circumstances '[a]ttorneys may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy.'" (*Id.* at p. 46.) Among these circumstances are "claims against an attorney for conspiring with his or her client to cause injury by violating the attorney's own duty to the plaintiff." (*Id.* at p. 47.)

In this case, the Bates' allegations may be construed as asserting liability of the latter kind, i.e., a claim against Davis for conspiring with his client to cause injury by violating a duty owed to the Bates.

i. Participation in Breach of Trust

In *Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 Cal.App.4th 1030, 1033 (*Wolf*), Division Four of this District held a trust beneficiary had a claim against attorneys who actively participated with the trustee in breaches of fiduciary duty that essentially looted the trust. The court explained that "[o]rdinarily the trustee is the real party in interest when a cause of action is prosecuted on behalf of a trust. However, the California courts have accepted the common law exception to this rule, permitting a trust beneficiary to bring an action against third parties who actively participate in a trustee's breach of trust." (*Ibid.*)

Wolf observed that Probate Code section 16420, subdivision (a) provides a beneficiary or cotrustee certain specified remedies for a trustee's breach of trust. (*Wolf*,

supra, 76 Cal.App.4th at p. 1038.) Subdivision (b) additionally provides that a beneficiary or cotrustee may "resort to any other appropriate remedy provided by statute or the common law." (See *Wolf, supra*, at pp. 1038-1039.)

The *Wolf* court continued: "Such an appropriate common law remedy is defined in section 326 of the Restatement Second of Trusts. Section 326 of the Restatement provides that '[a] third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.' (See also Bogert, Law of Trusts and Trustees (rev. 2d. ed. 1995) § 868, pp. 104-109 [person who knowingly aids trustee in committing a breach of his duties is liable to the beneficiary]; 13 Witkin, Summary of Cal. Law ([10th ed. 2005]) Trusts, [§ 150, p. 712] [beneficiary may sue third persons who participate in breaches of trust].) Comment a to section 326 of the Restatement Second of Trusts provides an example that is relevant to this case: '[I]f the trustee purchases through a stockbroker securities which it is a breach of trust for him to purchase and the broker knows that the purchase is in breach of trust, the broker is liable for participation in the breach of trust.' [Citation.]" (*Wolf, supra*, 76 Cal.App.4th at p. 1039.)

As Bogert elsewhere explains, "[j]ust as every owner of a legal interest has the right that others shall not, without lawful excuse, interfere with his possession or enjoyment of the property or adversely affect its value, so the beneficiary, as equitable owner of the trust res has the right that third persons shall not knowingly join with the trustee in a breach of trust." (Bogert, Law of Trusts and Trustees, *supra*, § 901, p. 304.) Under California law, liability for aiding and abetting "'may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.'" (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326; see *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 579.)

In *Moore v. Shaw* (2004) 116 Cal.App.4th 182 (*Moore*), relying on *Wolf*, Division Three of this District upheld claims against an attorney, who allegedly intentionally and negligently participated in a breach of trust by drafting an agreement enabling the trustee to prematurely terminate a trust to the detriment of the plaintiff and other contingent beneficiaries. (*Id.* at p. 190.) The court held plaintiff showed a reasonable probability of prevailing on the merits in that the attorney admitted in her declaration that she had read the trust instrument before drafting the termination agreement.[3] "Based thereon, the trier of fact could infer [the attorney] knew [the trustee] was committing a breach of trust by prematurely terminating the . . . Trust and that she actively participated in [the trustee's] breach of trust." (*Id.* at p. 198.)

Here, Davis's March 2004 letter to Jack Calig itself indicates Davis was aware of the provisions of the 2003 trust, knew the trust was irrevocable, and plainly advised his client "the only way around it is to ignore" the trust document and to "remove the property from this trust . . . ." The letter provides prima facie evidence that Davis knew the 2003 trust was irrevocable but nevertheless aided and abetted, indeed instigated and encouraged, his client to breach his fiduciary duty as trustee.

ii. Breach of Independent Duty

Another circumstance in which an attorney can be liable for conspiring with his or her client is when the attorney violates his or her own duty to the plaintiff. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 392; see also *Doctors' Co.*, *supra*, 49 Cal.3d at p. 47.) Such is the case here, in that Davis had an independent duty not to convert, or to assist in the conversion of, another's property. (*McCafferty v. Gilbank* (1967) 249 Cal.App.2d 569, 576; *Weinberg v. Dayton Storage Co.* (1942) 50 Cal.App.2d 750, 756-

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[3] Although *Moore* involved the showing of a reasonable probability of success necessary under Code of Civil Procedure section 425.16, the court noted that section 425.16 is "analogous" to other statutes, such as section 1714.10, "requiring the plaintiff to make a threshold showing, which are aimed at eliminating meritless litigation at an early stage." (*Moore*, *supra*, 116 Cal.App.4th at p. 193.)

757; see also *Miller v. Rau* (1963) 216 Cal.App.2d 68, 75-76; *Wells Fargo Bank v. Dowd* (1956) 139 Cal.App.2d 561, 576-577.)

Davis relies on *Berg & Berg*, in asserting he owed no independent duty to the Bates. In *Berg & Berg*, a creditor of a debtor who made an assignment for the benefit of creditors brought a cause of action against the assignee and the assignee's attorney, alleging an attorney-client conspiracy to deplete the assets of the assignor corporation. (*Berg & Berg*, *supra*, 131 Cal.App.4th at p. 809.) Plaintiff alleged solely that the attorney performed "unnecessary and unreasonable" services for his client, the assignee, adverse to plaintiff and charged the assignee excessive fees paid from the debtor's assets. (*Id.* at pp. 812-813.) There was no allegation or showing the attorney did anything beyond representing the assignee. Nor were any facts pleaded establishing the existence of any independent duty owed by the attorney to the plaintiff creditor. (*Id.* at pp. 812-814.)

In the present case, the conduct cited against Davis goes beyond merely acting within the appropriate role of counsel for a client. The Bates alleged and showed that Davis formulated a plan for the trustee to subvert an irrevocable trust and actively assisted the trustee in depriving the equitable owners of the benefits of that trust.

Panoutsopoulos v. Chambliss (2007) 157 Cal.App.4th 297, upon which Davis also relies, does not preclude the result here. In *Chambliss*, the court held attorneys representing a property owner seeking to evict its lessees or renegotiate the terms of the lease did not step out of their role as advocates by writing letters regarding plaintiff lessees' purported breaches of the lease and in giving plaintiffs three-day notices. (*Id.* at p. 308.) Although the attorneys had also attempted to induce a plumber to misrepresent plaintiffs' responsibility for a drainage problem on the premises, the court decided the conduct was not actionable because the plumber refused to write a false report and plaintiffs were not harmed by the attorneys' conduct. (*Ibid.*) In the present case, as in *Chambliss*, Davis stepped out of his role as a legal advocate, but, unlike the plaintiffs in *Chambliss*, the Bates made a prima facie case that Davis's conduct independently caused them harm.

DISPOSITION

The order is affirmed. The Bates are to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, Acting P. J.

We concur:

BIGELOW, J.

O'NEILL, J.*

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.